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HAROLD B. WILLEY,

IN THE

# Supreme Court of the United States

October Term, 1953

No. 452

BUZZA-CARDOZO, a California corporation,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.**

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IN THE

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No. .....

BUZZA-CARDOZO, a California corporation,

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

*To the Chief Justice, and to the Associate Justices of the Supreme Court of the United States:*

The Petitioner herein, Buzza-Cardozo, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, enforcing an order of the National Labor Relations Board.

## Jurisdiction.

Respondent petitioned the United States Court of Appeals for the Ninth Circuit for the enforcement of its order against Petitioner, pursuant to the provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 39 U. S. C., Supp. IV, Sec. 141, *et seq.,* hereinafter

called "the Act," an Act of Congress regulating interstate commerce.

Judgment of the United States Court of Appeals was entered on July 15, 1953. A petition for rehearing was filed by Petitioner on August 4, 1953. The petition for a rehearing was denied on August 6, 1953. The case is reported at 205 F. 2d 889.

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, 28 U. S. C. Supp. IV and Rule 38, subsection 5(b) of the Revised Rules of the Supreme Court of the United States.

**Statutes Involved.**

The statute involved is the Labor-Management Relations Act of 1947, 29 U. S. C., Supp. IV, Section 141, *et seq.*, which amends the National Labor Relations Act, and prescribes the rights and duties of employees, labor organizations and employers in their relations affecting commerce. Petitioner asks leave to refrain from reprinting at this point the numerous provisions of the Act which bear on the argument on the merits.

**Statement of the Case.**

There is no dispute as to the facts in this case. Buzza-Cardozo, Petitioner herein, is a California corporation engaged in the manufacture, sale, and distribution of greeting cards. Its principal plan and place of business is located in Los Angeles, California. Petitioner admits it is engaged in commerce within the meaning of the Act.

In October, 1950, thirteen of the seventeen employees in the Silk Screen Department of Petitioner's plant signed cards designating the Sign and Pictorial Painters Union, Local 831, A. F. of L., herein called "the Union," as their

bargaining representative. [R. 14.] During the months of November and December of 1950, the Union contacted Petitioner relative to union representation. The Union sought a contract with Petitioner covering the employees of the Silk Screen Department. The Union informed Petitioner that they represented a majority of the employees in the unit. Petitioner suggested that the Union process a representation case with the Board since Petitioner questioned the appropriateness of a unit confined to a single department rather than a plant-wide unit. [R. 25-27.] At this time there were approximately 122 production and maintenance employees in the entire plant. On November 27, 1950, the Union filed a petition for certification of representatives in a unit covering the seventeen employees in the Silk Screen Department. [R. 27-28.] Subsequent to the events upon which the unfair labor practices herein are predicated, the Union in March, 1951, withdrew its petition for certification.

In the fall of 1950, Petitioner, in an effort to increase production in its Silk Screen Department, instituted a bonus incentive plan for its Silk Screen Department employees. Considerable opposition to the plan developed among the employees in the Silk Screen Department, and Petitioner twice liberalized the bonuses. Still the printers were dissatisfied with the production schedules, while the helpers complained of low earnings under the incentive plan. [R. 14-15.]

The matter came to a head on the morning of January 17, 1951. A group of the employees, with Barnett, a printer, as spokesman, told Petitioner's foreman that they desired a meeting with the management to discuss their dissatisfaction with the incentive plan. Shortly before noon Petitioner's assistant office manager met with the

Silk Screen employees. The employees raised the question of a wage increase for the Department. Disclaiming any authority to increase wages, Petitioner's assistant office manager arranged a meeting with Production Manager Verhaaren for that afternoon. [R. 15.]

At 3:00 P. M. Verhaaren and the Silk Screen employees met in the department. Verhaaren defended the incentive plan, insisting that all the employees would benefit if the printers increased their production. The employees claimed their earnings were too low and demanded a wage increase. Verhaaren said he would present their case to Petitioner's Board of Directors and report back later in the day. At about 4:00 P. M., Verhaaren returned to the Silk Screen Department and informed the employees that the Board of Directors was unable to grant a wage increase because of the lagging plant production. After this announcement the discussion became quite heated. One or two of the employees suggested that they should stay away from work until their demands were met. Verhaaren told the employees that he would replace anyone who did not report to work since he had a production quota to meet. Several insulting remarks were directed towards Verhaaren and one of the employees shook his fist at Verhaaren. [R. 15-17.]

On the following day when the eleven employees involved did not show up for work, Petitioner determined to discharge them. In order to prevent a discharge for cause appearing on the employees' record, however, Petitioner entered the employees' termination as a "vountary quit." Letters were sent to each of the eleven employees stating that since they had quit their jobs, the company was enclosing all compensation due them in full. [R. 19.]

The following morning, January 19, 1951, eight of the employees reported for work and were informed by Verhaaren that Petitioner had construed the employees' work stoppage as a "quit." Verhaaren also told the employees that their checks had been mailed to them, and that, since there were no jobs available, he could do nothing more for them. In the week following, Petitioner employed sixteen new employees in this department, eight printers and eight helpers. [R. 19-21.]

Subsequently, separate charges were filed against Petitioner by Edward Baca, an individual, on March 13, 1951, and by the Sign & Pictorial Painters' Local 831, A. F. of L., on May 1, 1951. On June 22, 1951, the Board issued a consolidated complaint against Petitioner alleging that Petitioner had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act. The complaint alleged (1) that on or about January 18, 1951, Petitioner discharged eleven employees of the Silk Screen Department because they had engaged in lawful concerted activities for their mutual aid and protection and because they had engaged in a strike, and (2) that the union represented a majority of the employees of the Silk Screen Department, an appropriate bargaining unit, and that on and after November 8, 1950, Petitioner refused to bargain with the union as the representative of these employees. Petitioner denied the commission of any unfair labor practices.

After the usual proceedings, the Board concluded that the eleven employees had engaged in lawful concerted activity for their mutual aid and protection and that Petitioner had interfered with the employees' Section 7 rights in violation of Section 8(a)(1) of the Act. [R.

47.] The Board also found that the employees by their action constituted themselves a labor organization within the meaning of Section 2(5) of the Act, and, therefore, that Petitioner's conduct also violated Section 8(a)(3) of the Act as discouraging membership in this "labor organization." [R. 47.] The Board ordered Petitioner to cease and desist from engaging in the unfair labor practices found, and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. [R. 51.] The Board ordered Petitioner to offer full reinstatement to the eleven employees and to make whole these employees for any loss of pay they may have suffered. [R. 49.]

The Board dismissed the allegation in the complaint that Petitioner violated Section 8(a)(5) of the Act on two grounds, first, that the unit sought, that is, the Silk Screen Department was not appropriate, and, second, that Petitioner did not refuse to bargain with the union. [R. 29.]

Respondent filed a petition for enforcement of its order on August 14, 1952. On July 15, 1953, the Ninth Circuit Court enforced Respondent's order in part. The Ninth Circuit Court enforced the Board's finding of an unfair labor practice under Section 8(a)(1) of the Act, but denied enforcement of the Board's finding of an unfair labor practice under Section 8(a)(3) of the Act. A petition for rehearing was filed by Petitioner on August 4, 1953, which was denied August 6, 1953. Petitioner has been ordered to offer reinstatement to the eleven discharged employees with back pay from January 19, 1951. The case is reported at 205 F. 2d 889.

## Statement of Questions Presented.

Where a majority of the employees in the Silk Screen Department of a greeting card manufacturer designate a certain union as their exclusive bargaining representative, and the union files a petition for certificate with the Board, which is pending and unresolved at the time that eleven employees in that department, without union authorization or participation, engage in a one-day strike for a wage increase, are the employees engaged in protected concerted activity within the meaning of Section 7 of the Act?

## Reasons Relied Upon for Granting of Writ.

1. The power of the Supreme Court to grant a Writ of Certiorari is invoked pursuant to Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States in that the Ninth Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by the Supreme Court of the United States, and to permit such settlement by the Supreme Court, the Writ should be granted.

2. The power of the Supreme Court to grant a Writ of Certiorari is invoked pursuant to Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States in that the Ninth Circuit Court of Appeals has decided important questions of federal law in a way probably in conflict with applicable decisions of the Fourth, Seventh and Eighth Circuit Courts of Appeals.

3. The questions involved in this case are of great importance. So-called "wild-cat" strikes, that is, strikes called by a minority of the employees in derogation of the authority of the union which they have designated as

their exclusive bargaining representative, continually disrupt the orderly collective bargaining process established by the Act, to the detriment of employer, employees, and union alike. The action of a minority of the employees in this case in taking the bargaining out of the hands of the legally chosen representatives has been upheld by the Ninth Circuit Court, whereas such action has been denied the protection of the Act by the Fourth Circuit Court in *NLRB v. Draper Corporation,* 145 F. 2d 199, and the Eighth Circuit Court in *NLRB v. Brashear Freight Lines,* 119 F. 2d 379. A question of representation by the A. F. of L. union was pending and undetermined before the Board at the time that the employees demanded that Petitioner recognize the employees' demands. In protecting this conduct, the decision of the Ninth Circuit Court is contrary to the principles enunciated by the Seventh Circuit Court in *NLRB v. Bradley Washfountain Co.,* 192 F. 2d 144.

**Conclusion.**

For the foregoing reasons, and for the reasons set forth in the Brief in support of this Petition presented herewith, Petitioner prays that this Petition be granted and that the aforesaid questions be determined by this Court upon the granting of a Writ of Certiorari herein.

Respectfully submitted,

CARL M. GOULD,
for
HILL, FARRER & BURRILL,
*Counsel for Petitioner.*

**Certificate of Counsel.**

I, the undesigned, Carl M. Gould, Counsel for Petitioner herein, hereby certify that in my judgment and opinion the foregoing Petition for a Writ of Certiorari is well founded, and that it is not interposed for purpose of delay.

CARL M. GOULD.

IN THE

# Supreme Court of the United States

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No. .....

BUZZA-CARDOZO, a California corporation,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The statements in the Petition for Writ of Certiorari presented herewith with regard to the paragraphs entitled "Jurisdiction," "Statutes Involved," "Statement of the Case," and "Statement of Questions Presented," are incorporated by reference thereto. This case is reported at 205 F. 2d 889.

## Summary of Petitioners' Argument.

1. The *Draper* case, *supra,* 145 F. 2d 199, holds that a strike by a minority group of employees is unprotected "wildcat" activity where the said employees have a certified union to represent them. In the instant case, a petition for certification of the union was pending at the time that the eleven employees went on "strike." The principles of the *Draper* case, *supra,* extend to a situation where a petition for certification is pending before the Board as well as to a case where the Board has certified the union as the bargaining representative, and that the "strike" was unprotected.

2. It is an unfair labor practice for an employer to recognize, or deal with any union, or a group of its employees, at a time when a petition for certification is pending before the Board and a question of representation is raised. Hence, the action of the employees was unprotected, since it was for an unlawful purpose, namely, to compel Petitioner to deal with them at a time when Petitioner could not lawfully do so.

3. The Ninth Circuit Court erred in holding that even though Petitioner could not lawfully grant the demands of the employees and was not obligated to bargain with the employees, nevertheless the employees were engaged in protected concerted activity, since the employees were not employees as defined in Section 2(3) of the Act as no current "labor dispute" existed.

## ARGUMENT.

### I.

### The Employees Were Engaged in a "Wildcat Strike" Which Was Not Within the Protection of the Act.

In *NLRB v. Brashear Freight Lines* (C. C. A. 8th), 119 F. 2d 379, the facts were these:

A union representative asked for a meeting with the employer to discuss a contract covering the truck mechanics which he represented. The employer told the representative that he was too busy to confer and that it would do little good, since he would not pay the wages requested. Thereupon, those employees who had signed up in the union went out on strike at once and began picketing the plant. The Board found that the union never had a majority of the employees in an appropriate unit as its members, but nevertheless found that the employees were engaged in concerted activity within the meaning of the Act and ordered the employer to reinstate the striking employees.

The Circuit Court refused enforcement of this portion of the Board's order stating at page 382:

> "It is clear that the sole reason and occasion for this strike was the refusal to bargain with the representative of the Union. The Union membership never included a majority of the employees in the unit. There was no legal obligation to bargain with this representative of a minority. Even if the position of respondent, at the time of the refusal to bargain with a minority representative, was that it

would not bargain with a union, yet such minority is in no position to strike because of failure to bargain with it and then receive compulsory reinstatement. *Just as the employer, if he refused to bargain with the representative of a majority of a proper unit, acts at his peril; so a minority of the employees, who strike because the employer refuses to bargain with their representative, do so at their peril in so far as compulsory reinstatement is concerned.* Under the finding of the Board that the representative was of a minority only of the proper unit and under the undisputed evidence that the sole reason for the strike was the failure to bargain with such representative, there was no substantial evidence to sustain that portion of the order requiring reinstatement or preferential listing of these striking employees." (Emphasis added.)

The *Brashear* case, *supra,* comes as close to being a "spotted calf" case as one can find. There is but one factual difference between the *Brashear* case, *supra,* and the instant case: In the *Brashear* case it was the union representative who approached the employer and was told that the employees' wage demands could not be met; in the instant case, it was a group of the employees themselves who approached the employer and were told that the employees' wage demands could not be met. In both instances, the employer refused to bargain over wages with the representative or representatives of the union. Of course, there is no legal distinction in the fact that in one case the employer refused to bargain over wages with the representative of a minority of the employees and in the other case the employer refused to bargain over wages with a minority of the employees themselves.

In fact, a union is nothing more than an association of individuals.

In *NLRB v. Draper Corporation* (C. C. A. 4th), 145 F. 2d 199, negotiations between a union representing the employees of defendant company and the company resulted in a deadlock over a closed shop and increased pay. Negotiations broke off when an official of the company raised the question as to whether the union still represented a majority of the employees in the plant. Thereafter, 41 employees in the foundry department refused to go to work, stating that the company was "stalling" and that they wanted "action" and would get it. The men were told either to go to work or get out of the plant. Thereupon the 41 employees voted to strike. The following day the men were paid off in full and given mailed settlement forms stating that they were discharged for engaging in the strike. Five days later the men sought reinstatement but the company refused to reinstate the employees for two and a half months. The issue in the case was whether the discharge of the 41 employees and the subsequent refusal to reemploy them were unfair labor practices.

The Board held that the employees were engaged in "concerted activity" within the meaning of Section 7 of the Act and that the employer was engaged in unfair labor practices.

The Circuit Court refused to enforce the Board's order, holding that the strike was not "concerted activity" which falls within the protection of Section 7 of the Act, but was a strike in violation of the purposes of the Act by a minority group of employees who sought to take matters into their own hands and deal independently with the employer.

The Court relied on the *Brashear* case, *supra*, in support of its decision, saying at pages 203-204:

> "In that case [Brashear Freight Lines] a minority of employees went on strike because the employer would not recognize and bargain with a union representing the minority. *There, as here, there was a strike by a minority because the employer did not accede to their demands* . . .
>
> "There is stronger reason in the case at bar than in the Brashear Freight Lines case for holding that the striking minority are not protected from discharge by the provisions of the act. The particular grievance which led to the strike by the minority here was the failure of the employer to go forward with the bargaining which had been arranged by the representative of all the employees. The effort of the minority was thus to take the bargaining out of the hands of the legally chosen representatives and proceed with it themselves; *and if a discharge, as in the Brashear case, is justified, where a minority of employees, in the absence of a bargaining agent, go on strike because of the refusal of the employer to deal with them, certainly the discharge is justified where the only reason for the strike is the refusal to deal with a minority which is seeking to usurp the function of the agent chosen by the majority.*" (Emphasis added.)

The purpose of the Taft-Hartley Act is not to guarantee to employees the right to do as they please, but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace. As the court said in the *Draper* case, *supra*, at page 203:

> ". . . there can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular

matters into their hands and deal independently with the employer. The whole purpose of the act is to give to the employees as a whole, through action of a majority, the right to bargain with the employer with respect to such matters as wages, hours and conditions of work. (Citing Section 9 of the Act.)

"A union selected as bargaining agent is thus made exclusive representative of all the employees for the purpose of collective bargaining. As said in Virginia R. Co. v. System Federation, 300 U. S. 515, 548, 57 S. Ct. 592, 600, 81 L. Ed. 789, *the law 'imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.'* (Citing cases.) *The employees must act through the voice of the majority or the bargaining agent chose by the majority . . .*" (Emphasis added.)

Under the circumstances of this case, since these employees had designated the A. F. L. union as their sole bargaining agent, Petitioner would have been guilty of undermining the Union had Petitioner condoned the employees' activity and acquiesced in their demands. Once the employees have selected their agent for collective bargaining and, as in this case, their agent is actively engaged in representing them, the employees, for the time being at least, have given up their right to take independent action.

In *NLRB v. Indiana Desk Co.* (C. C. A. 7th), 149 F. 2d 987, the facts were these:

A group of 23 out of 135 employees requested a wage increase of the plant superintendent. The superintendent told them their demand could not be granted and that they must either return to work or leave the plant. This group, which was later joined by 28 other employees, went

out on strike. The employer thereupon discharged the 51 employees. The Board found that the 51 strikers ceased work as a result of a wage dispute and that the employer was guilty of unfair labor practices.

The Circuit Court refused to enforce the Board's order, saying at pages 992-993:

> "In the instant situation, the striking employees while acting in a group were not the representative of respondent's employees for the purpose of bargaining, and respondent was under no obligation to bargain. (Citing the *Draper* case, *supra.*)
>
> * * * * * * * *
>
> "It is true, as noted, that in the Draper case as well as in the News case, *supra,* the employees were represented by a duly authorized bargaining agent. To that extent, the facts of those cases are distinguishable from those of the instant case; however, we are of the view that such difference in the facts does not alter the applicable principle. In either event, a minority group is authorized to present grievances, but in neither event is the employer obligated to bargain. Such was the reasoning in N. L. R. B. v. Brashear Freight Lines, 8 Cir., 119 F. 2d 379."

Neither the Board, nor the Ninth Circuit Court, cites any authority for their conclusion that the employees were privileged to assert their rights as they did through their joint action rather than through the A. F. of L. union. We respectfully submit that there are no such cases and that the decision is contrary to the decisions and rationale of the *Draper, Brashear,* and *Indiana Desk* cases, *supra.*

The law is clear that an employer commits an unfair labor practice when he recognizes or deals with any em-

ployee group where a question of representation has been raised.

*NLRB v. Bradley Washfountain Co.* (C. C. A., 7th), 192 F. 2d 144, 155;

*Midwest Piping and Supply Co.*, 63 NLRB 1060, 1070;

*International Harvester Co.*, 87 NLRB 1123, 1125.

In the *Bradley Washfountain* case, *supra*, the Seventh Circuit Court held that an employer commits an unfair labor practice when he recognizes or deals with a union at a time when a petition for decertification of that union is pending before the Board. If an employer commits an unfair labor practice when he recognizes or deals with the union at the time when a petition for *decertification* has been filed with the Board, does it not logically follow that an employer commits an unfair labor practice when he recognizes or deals with his employees at the time that a petition for *certification* has been filed with the Board?

Section 2(5) of the Act provides:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning greviences, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

The Board has consistently taken the position that employees who join together to further a demand constitute a labor organization within the meaning of Section 2(5) of the Act.

*The Ohio Oil Company*, 92 NLRB 1597, 1598, 1599;

*Gullet Gin Co.*, 83 NLRB 1, 2;

*Duro Test Corporation*, 81 NLRB 986, 979;

*Kennametal, Inc.*, 80 NLRB 1481;

*Ever Ready Label Corporation*, 54 NLRB 551.

The circuit courts have made similar rulings.

*NLRB v. Kennametal, Inc.* (C. C. A. 3), 182 F. 2d 817, 818;

*NLRB v. Smith Victory Corp.* (C. C. A. 2), 190 F. 2d 56, 57.

The Ninth Circuit Court in the instant case states that the contention that the striking employees constituted a labor organization is far-fetched. We respectfully submit that the statement is contrary to law. It is true, as the Court says, that the strikers did not seek representation, but they were demanding that the employer deal with them in regard to rates of pay. The striking employees meet the broad definition of a labor organization under the Act. Petitioner was confronted with conflicting claims for recognition, one by the A. F. of L. union and the other by the striking group of employees. A question of representation existed. If the employer granted the wage increase, he would have committed an unfair labor practice, inasmuch as an employer is prohibited from giving recognition to one group to the exclusion of another where a question of representation exists. Furthermore, Petitioner would have engaged in an unfair labor practice if the employer granted the wage increase, for, in that case, the employer is subject to the charge that the wage increase was granted directly to the employees to discourage membership in the A. F. of L. union.

The Ninth Circuit Court assumed that Petitioner could not recognize or deal with the striking employees, but

held that, nevertheless, the employees were engaged in protected concerted activity. We respectfully submit that in so holding, the Ninth Circuit Court was in error. This strike was precipitated by demands which Petitioner not only could not grant, but concerning which there was no obligation to bargain. The demand for increased wages did not give rise to a "labor dispute" as that term is used in the Act. It was not within the power of the strikers and the Petitioner to settle this "labor dispute" at the time the employees made their demands. By provision of law they were precluded from so doing until the representation question was resolved. As was said in *NLRB v. Indiana Desk Company*, 149 F. 2d 987, 990:

> "Sec. 2 of the National Labor Relations Act provides: 'The term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . .'
>
> * * * * * * * *
>
> "It hardly seems reasonable to think that a 'labor dispute' was intended to include a dispute, the settlement of which would have violated a statutory provision . . . In our judgment, however, the unconditional demand for an increase in wages did not give rise to a 'labor dispute' as that term is used in the Act."

The employees, as well as Petitioner, were obligated to await the determination of the Board as to who could properly act as the bargaining representative. The concerted activity of the employees was for an illegal purpose, namely, to force the employer to bargain with them, while a question of representation was pending, and the "strikers" are not entitled to compulsory reinstatement with back pay.

II.

**The Ninth Circuit Court Was in Error in Disposing of Part of Petitioner's Argument on the Ground That the Objection Was Not Raised Before the Board.**

Section 10(e) of the Act provides that no objection that has not been urged before the Board should be considered by the Court. Petitioner objected at each stage of the proceedings that the employees were engaged in unprotected concerted activity. This is the same objection that Petitioner urges now. Part of the *reasoning* presented to the Ninth Circuit Court in support of this objection was not presented to the Board but the Act does not require that counsel present at their peril all the *reasoning* in support of an objection. We respectfully submit that the objection that the employees were engaged in unprotected concerted activity was urged before the Board as required by the Act and that counsel are entitled to present to this Court any argument that will support such an objection.

**Conclusion.**

It is respectfully submitted that this Petition for Writ of Certiorari be granted and that the Court settle, with finality by its judgment, the uncertainty and conflict in the law which now exists.

Respectfully submitted,

CARL M. GOULD,
for
HILL, FARRER & BURRILL,
*Attorneys for Petitioner.*

Los Angeles, California, October, 1953.

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National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):

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# In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 452

BUZZA-CARDOZO, A CALIFORNIA CORPORATION,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (R. 302–306) is reported at 205 F. 2d 889. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 11–42, 45–53) are reported at 97 N. L. R. B. 1342.

### JURISDICTION

The judgment of the court below was entered on August 14, 1953 (R. 306–309). A petition for rehearing filed by petitioner on August 4, 1953, was denied on August 6, 1953 (R. 311). The pe-

tition for a writ of certiorari was filed on November 2, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 12–14.

## QUESTION PRESENTED

A group of petitioner's employees signed authorization cards for the purpose of designating a union as bargaining agent. Petitioner lawfully and successfully resisted the authority of the union to act as the exclusive bargaining representative on the ground that the unit which the union sought to represent was inappropriate for purposes of collective bargaining. Thereafter, a number of the employees went on strike in support of a demand for a wage increase. The question presented is whether in these circumstances petitioner violated Section 8 (a) (1) of the Act by discharging the striking employees.

## STATEMENT

A. *The Board's findings of fact:* Petitioner is engaged in the manufacture, sale, and distribution of greeting cards (R. 13, 4, 10). On January 17, 1951, a long-smoldering dispute between petitioner and its silk screen department employees over wages erupted. On that date a group of

these employees met several times with representatives of petitioner and requested a wage increase for the department (R. 15–16, 67–70, 71–72, 74–75, 119–120, 143–145, 160–161, 170, 177–178, 232–235, 258–260, 283). Petitioner rejected their demands (R. 16; 73–75) and the employees thereupon gave notice that they would go on strike the next day (R. 16–17; 73). The following day, January 18, 1951, eleven employees of the silk screen department stayed away from work (R. 17; 74, 121, 146, 156, 162, 170, 181, 209, 263–264). On the same day petitioner discharged them (R. 18–19; 125, 216–217, 78, 109, 123, 147–148, 162–163, 171, 181, 186–188, 195). Subsequently, petitioner hired other employees to replace the strikers whom it had discharged (R. 20–21; 135–140, 224, 286–287).

Prior to the strike the Union, the Sign and Pictorial Printers' Local 831, had obtained authorization cards from a majority of the employees in the silk screen department, and on November 17, 1950, requested petitioner to execute a collective bargaining contract covering a unit consisting of employees in the silk screen department (R. 25–26). Petitioner, after asking why the Union was seeking to represent a unit consisting of the silk screen department employees instead of a plant-wide unit,[1] challenged

[1] At this time petitioner employed 122 production and maintenance workers and 30 employees in its art department (R. 25).

the appropriateness of the smaller unit and suggested that the Union file with the Board a certification petition to establish its bargaining status (R. 26–27). The Union filed its petition with the Board on November 27, 1950 (R. 27–28). Thereafter, at a meeting between the Union, petitioner, and a Board representative, petitioner reaffirmed its position that the appropriate unit was a plant-wide unit (R. 28). No agreement was reached on this issue and in March 1951 the Union withdrew its petition (R. 28–29).

On March 13, one of the discharged strikers filed on behalf of himself and the other strikers a charge with the Board alleging in substance that petitioner had discharged the strikers in violation of Section 8 (a) (3) and (1) of the Act (R. 1–3). The Union also filed charges averring that petitioner had refused to bargain collectively with it in violation of Section 8 (a) (5) and (1) of the Act (R. 11). Thereafter, the General Counsel of the Board issued a consolidated complaint against petitioner based upon the two charges (R. 3–8).

B. *The Board's conclusions and order:* The Board dismissed the complaint insofar as it alleged that petitioner had unlawfully refused to bargain with the Union, for the reason that the unit sought to be represented by the Union was inappropriate for collective bargaining purposes (R. 36, 46). With respect to the strikers, the Board found that, in striking in support of their

wage demand, they had engaged in concerted activity for mutual aid and protection and that petitioner in discharging them for striking, had violated Section 8 (a) (1) of the Act (R. 46–47).[2] In so finding, the Board rejected petitioner's contention that the strike was a "wildcat" strike in derogation of the authority of the Union to represent them in collective bargaining and hence the strikers were not entitled to the protection of the Act. The Union, the Board pointed out, did not, as petitioner itself had contended, represent a majority of the employees in an appropriate unit; hence, there was no exclusive representative to whom the employees had delegated sole authority to bargain for them and the employees therefore remained free to act on their own behalf independently of the Union (R. 47–48).

The Board ordered petitioner to cease and desist from the unfair labor practices found; to offer reinstatement to the eleven strikers and to make them whole, as provided in the order, for any loss of pay caused by petitioner's unlawful action against them; and to post the usual notices of compliance (R. 51–53).

C. *The decision of the court below:* The court below enforced the Board's order with modifica-

[2] The Board also found that the discharge was violative of Section 8 (a) (3) as well on the theory that the striking employees constituted a labor organization (R. 47). The court below rejected this finding (R. 306); no question is presented here with respect to the Board's Section 8 (a) (3) finding.

tions not here material (R. 306). It adopted the Board's finding that petitioner's discharge of the strikers was violative of Section 8 (a) (1) of the Act. The court concurred with the Board in rejecting petitioner's contention that the strike was an unauthorized "wildcat" strike resulting in the employees' forfeiture of the statutory protection (R. 303–304). It also rejected (R. 305) petitioner's further contentions that the striking employees, by combining to further their wage demand, constituted a labor organization; that the strike was therefore illegal because its purpose was to compel petitioner to recognize one of two rival organizations presenting conflicting and unresolved representation claims and thereby implicate petitioner in an unfair labor practice; and that the strikers thereby lost the protection of the Act. The court concluded that this contention was not, under the provisions of Section 10 (e), properly before the court since it had not been previously urged before the Board[3] and that, in any event, the strikers did not constitute a labor organization within the meaning of the Act, nor were they asking for recognition but were merely seeking a raise in pay (R. 305).

[3] Before the Board, petitioner, in its exceptions to the trial examiner's intermediate report, had taken the contrary position and had urged that the strikers did not constitute a labor organization (R. 24, 44).

ARGUMENT

1. Petitioner's discharge of the striking employees constituted a plain infringement of the employees' right to engage in concerted activities for mutual aid and protection, in violation of Section 8 (a) (1) of the Act.[4] Petitioner's contentions (Pet. 13–18) that the strike was an unprotected "wildcat" strike in derogation of the Union's authority to represent them and that the decision below is in conflict with *National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199 (C. A. 4), and *National Labor Relations Board* v. *Brashear Freight Lines*, 119 F. 2d 379 (C. A. 8), are patently without merit and present no question warranting review by this Court.

In defending against the allegation of the complaint that petitioner had unlawfully refused to bargain with the Union, petitioner successfully contended before the Board that it was not re-

[4] *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (C. A. 3); *National Labor Relations Board* v. *J. I. Case Co.*, 198 F. 2d 919 (C. A. 8); *Modern Motors, Inc.* v. *National Labor Relations Board*, 198 F. 2d 925 (C. A. 8); *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 843 (C. A. 4); *J. A. Bentley Lumber Co.* v. *National Labor Relations Board*, 180 F. 2d 641 (C. A. 5); *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499 (C. A. 5); *National Labor Relations Board* v. *Kalamazoo Stationery Co.*, 160 F. 2d 465 (C. A. 6), certiorari denied, 332 U. S. 762; *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717–718 (C. A. 8); *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927 (C. A. 2).

quired to bargain with the Union because it "did not represent a majority in an appropriate unit" (R. 48, 24–36). Accordingly, as the Board found (R. 48), there was no exclusive representative to whom the employees had delegated sole authority to bargain for them and the employees therefore remained free to act on their own behalf independently of the Union. Petitioner cannot have it both ways; it cannot successfully resist the authority of the Union to act as the exclusive representative, and at the same time insist that the employees are bound to treat only through the Union.

The decisions cited by petitioner (Pet. 13, 15, 17) did not reach a contrary result. The *Draper* case merely held that a strike by a minority group was not entitled to the protection of the Act because it was designed "to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees" and "to take the bargaining out of the hands of the legally chosen representatives and proceed with it themselves" "in violation of the purposes of the act and of an agreement existing between the employer and employees for orderly collective bargaining" (145 F. 2d at 203, 204, 205). The vice in *Draper,* therefore, was action taken by a minority group in derogation of the stand taken by the exclusive representative. In this case, since there was no bargaining representative entitled to

exclusive recognition, the rationale of *Draper* cannot possible apply. The *Brashear* case, as the court below pointed out (R. 303), is "authority for no more than the proposition that the employees who struck did so at the risk of having their places filled during the pendency of the strike."[5]

2. The court below properly rejected petitioner's contention (Pet. 18–21) that the strike was illegal because its purpose was to require the employer to recognize one of two rival labor organizations in the face of conflicting representation claims and thereby implicate petitioner in an unfair labor practice.[6] This contention was not urged before the Board, it being raised for the first time in the court below.[7] This alone requires, as the court below held (R. 305), rejection of the belated contention. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344

[5] Petitioner also relies on *National Labor Relations Board* v. *Indiana Desk Co.*, 149 F. 2d 987 (C. A. 7). That case was concerned with a strike which had as its object the securing of a wage increase in violation of wartime wage control measures. The court held that a strike for such an illegal purpose was outside the protection of the Act. There is no connection between the instant case and *Indiana Desk*.

[6] One of the premises on which this contention is bottomed is that the employees, by combining to further their wage demand, constituted a labor organization within the meaning of Section 2 (5) of the Act.

[7] Indeed, before the Board petitioner, contrary to its position in the court below, challenged the finding of the trial examiner that the striking employees constituted a labor organization (*supra*, p. 6, n. 3).

U. S. 344, 350; *National Labor Relations Board* v. *Cheney Lumber Co.*, 327 U. S. 385, 388–389. In any event, as the court also correctly held (R. 305), there is no merit to the contention. Where employees are in the process of deciding which of several competing unions to choose as exclusive representative, and the choice is genuinely in issue, the employer abridges their freedom of choice if he extends exclusive recognition to a union whose representative status is still unresolved. *Midwest Piping and Supply Co.*, 63 N. L. R. B. 1060, 1070. Here, however, as the court stated (R. 305), the employees who struck in support of their wage demand were not seeking recognition as bargaining representatives; all they wanted was a raise in pay. Thus, even if the striking employees are regarded as constituting a labor organization within the meaning of the Act,[5] petitioner was not in this case confronted with any conflicting claims for exclusive recognition and hence the basic premise on which its contention rests is without foundation. See *Gullet Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499, 501 (C. A. 5).

**CONCLUSION**

The decision below presents no substantial question warranting review and is not in conflict with

[5] The court below thought that it was "far-fetched" to regard the strikers as constituting such a labor organization (R. 305).

decisions of this or other courts. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1953.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

### Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

### Unfair Labor Practice

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

### Representatives and Elections

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of

collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the

Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1959

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